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No.—356

In the Supreme Court of the United States

OCTOBER TERM, 1929

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

THE PILLIOD LUMBER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered in the above cause on June 3, 1929, reversing the decision of the United States Board of Tax Appeals.

STATEMENT

The facts as found by the Board of Tax Appeals, (R. 9–11), are as follows:

On or about March 14, 1919, the respondent, Pilliod Lumber Company, executed and filed with the

Collector of Internal Revenue a tentative return and estimate of its corporate income and profits taxes for the calendar year 1918. This return was signed and sworn to by the president and treasurer of the respondent corporation and showed an estimated tax for the year 1918 in the amount of $4,000.

On May 31, 1919, the respondent filed with the Collector of Internal Revenue Form 1120, the return form for 1918, setting forth its gross income, deductions and credits, and the other information required by law. This document was neither signed nor sworn to by anyone. The name and address of the corporation appeared in typewriting in the caption.

In December, 1921, an investigation of the respondent's tax liability for the year 1918 was made by an agent of the Internal Revenue Bureau, and on September 17, 1923, the president and treasurer of the respondent corporation executed an affidavit in which they affirmed that their names should have appeared on the return filed May 31, 1919, and that the return to the best of their knowledge and belief was correct.

On October 23, 1925, the Commissioner mailed to the respondent a written notice of his determination of a deficiency in respect to the income and excess-profits taxes for the year 1918 in the amount of $963.34.

From this determination the respondent appealed to the United States Board of Tax Appeals on the

ground that the additional assessment was barred by the statute of limitations. The Board held that the unsworn return filed on May 31, 1919, was not the return required by law and did not set the statute of limitations in motion. It accordingly entered judgment for the Commissioner. (R. 11–13.)

On appeal by the respondent the Circuit Court of Appeals reversed the Board. (R. 17.) A majority of the judges held that while the statute requiring returns to be verified is to be observed and is of importance, an unsworn return is not necessarily a nullity and that, (R. 19), "It would be the duty of the collector to whom such a paper was tendered to refuse to receive it, and the omission would probably be at once corrected."

Circuit Judge Moorman dissented. (R. 20.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that an unsigned and unsworn tax return is such a return within the meaning of Section 239 of the Revenue Act of 1918 as to set in motion the five-year period of limitation provided by Section 277 (a) (2) of the Revenue Act of 1924 for the assessment and collection of taxes.

(2) In holding that the failure of the Collector of Internal Revenue to call attention to the defect in the return in effect barred the Government from raising objection that the document filed was not in a form to set the statute of limitations in motion.

REASONS FOR GRANTING THE WRIT

(1) The question here involved is of importance and is one of constant recurrence. A decision by this Court is desirable in order that the question may be definitely settled.

(2) The decision of the Circuit Court of Appeals is contrary in principle to the decisions of this Court in *Rock Island, etc., R. R.* v. *United States,* 254 U. S. 141, and *Girard Trust Co.* v. *United States,* 270 U. S. 163, which hold that even formal requirements of taxing statutes must be complied with. The requirement of an oath to a tax return is more than a formal requirement. The information necessary for the Commissioner to assess income taxes is peculiarly within the knowledge of the taxpayer. The only practicable way to make reasonably sure of the accuracy of that information is to require, as has been done, that it be furnished by the taxpayer under the sanctity of an oath. In *Beam* v. *Hamilton,* (C. C. A., 6th), 289 Fed. 9, it was held that a failure to comply with the strict requirements of the statute relating to returns was a failure to make the return contemplated by the statute.

(3) The holding of the Circuit Court of Appeals that the Government is barred from raising objection to the form of the document by reason of the failure of the Collector of Internal Revenue to detect the defect in taxpayer's return at the time it was filed is contrary to the well-established rule that the Government is never liable for the negligence or laches of its agents. *United States* v. *Kirk-*

patrick, 9 Wheat. 720; *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409; *Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123, 125.

(4) The decision of the Circuit Court of Appeals is in conflict with the decisions of such State courts as have had occasion to pass upon the question. *Newell* v. *Whitingham,* 58 Vt. 341; *Lawrence* v. *City of Janesville,* 46 Wis. 364; *Lee* v. *The Commonwealth,* 36 Ky. 311; *Narragansett Pier Co.* v. *Assessors,* 17 R. I. 452. Moreover the opinion of the Circuit Court of Appeals in the instant case was by a divided court and the majority opinion admits that the question is not free from doubt.

(5) The question is related in principle to the question involved in the case of *Florsheim Bros. Dry Goods Co.* v. *United States,* 29 F. (2d) 895, where the Circuit Court of Appeals for the Fifth Circuit held that the statute of limitations is not set in motion by the filing of a tentative return. The *Florsheim case* and the case of *White* v. *Hood Rubber Co.,* not yet reported, decided June 25, 1929, in which the Circuit Court of Appeals for the First Circuit reached an opposite conclusion as to the sufficiency of a tentative return, are now pending before this Court on petitions for writs of certiorari.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Sixth Circuit should be granted.

CHARLES E. HUGHES, JR.,
Solicitor General.

AUGUST, 1929.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the United States Board of Tax Appeals (R. 11–13) is reported in 7 B. T. A. 591. The opinion of the Circuit Court of Appeals (R. 17) is not yet reported.

JURISDICTION

The decree of the Circuit Court of Appeals was entered June 3, 1929. (R. 17.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Is the filing of an unsigned and unsworn tax return a sufficient compliance with the provisions of Section 239 of the Revenue Act of 1918 to set in motion the five-year limitation of Section 277 (a) (2) of the Revenue Act of 1924, within which income and excess-profits taxes imposed by the Revenue Act of 1918 must be assessed and collected?

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1081, 1083, are as follows:

> SEC. 239. That every corporation subject to taxation under this title and every personal service corporation shall make a re-

turn, stating specifically the items of its gross income and the deductions and credits allowed by this title. The return shall be sworn to by the president, vice president, or other principal officer and by the treasurer or assistant treasurer. * * *

SEC. 250. (d) Except in the case of false or fraudulent returns with intent to evade the tax, the amount of tax due under any return shall be determined and assessed by the Commissioner within five years after the return was due or was made, and no suit or proceeding for the collection of any tax shall be begun after the expiration of five years after the date when the return was due or was made. In the case of such false or fraudulent returns, the amount of tax due may be determined at any time after the return is filed, and the tax may be collected at any time after it becomes due.

The pertinent provisions of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 301, are as follows:

SEC. 277. (a) Except as provided in section 278 and in subdivision (b) of section 274 and in subdivision (b) of section 279—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1918, * * * shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

SEC. 280. If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277.

Article 407 of Treasury Regulations 45, (1919 ed.), promulgated April 17, 1919, provides:

> Copies of the prescribed return forms will so far as possible be furnished taxpayers by collectors. Failure on the part of any taxpayer to receive a blank form will not, however, excuse him from making a return. Taxpayers not supplied with the proper forms should make application therefor to

> the collector in ample time to have their returns prepared, verified and filed with the collector on or before the last due date. Each taxpayer should carefully prepare his return so as fully and clearly to set forth the data therein called for. Imperfect or incorrect returns will not be accepted as meeting the requirements of the statute. In lack of a prescribed form a statement made by a taxpayer disclosing his gross income and the deductions therefrom may be accepted as a tentative return, and if filed within the prescribed time a return so made will relieve the taxpayer from liability to penalties, provided that without unnecessary delay such a tentative return is replaced by a return made on the proper form. * * *

The regulations since then have remained unchanged. See Regulations 45, (1920 ed.), Revenue Act of 1918; Regulations 62, (1922 ed.), Revenue Act of 1921; Regulations 65, Revenue Act of 1924; Regulations 69, Revenue Act of 1926.

ARGUMENT

It is provided by Section 277 (a) (2) of the Revenue Act of 1924 that taxes imposed by the Revenue Act of 1918 "shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period." The return to which this section has reference is the one defined in Section 239 of the Revenue Act of 1918. That section requires (1) that the return shall state spe-

cifically the items of gross income and the deductions and credits allowed, and (2) that the return shall be sworn to by two designated officers of the corporation.

The statute thus squarely places upon the taxpayer the burden of fixing the time when the statute of limitations begins to run in his case. That time is when the return defined by Section 239 is filed. Anything short of compliance with all the statutory requirements of that section would fail to make a return the return required by the statute. As was said in *Botany Mills* v. *United States,* 278 U. S. 282, 289, "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." See also *Davis* v. *United States,* 17 C. Cls. 292.

This Court has recognized the necessity of strict compliance with even the formal requirements of taxing statutes. In *Rock Island, etc., R. R.* v. *United States,* 254 U. S. 141, it affirmed the judgment of the Court of Claims in dismissing a petition for the recovery of taxes, on the ground that the taxpayer, while making a claim for an abatement of the tax, failed to make a formal claim for refund as required by Section 3226, Revised Statutes, as amended by the Act of February 27, 1877. As pointed out by Mr. Justice Holmes, who delivered the opinion of the Court, (p. 143), "Men must turn square corners when they deal with the Government."

In respect of its importance and the necessity of strict observance, the requirement of an oath to a return to set in motion the statute of limitations is like the requirement of Section 1324 (a) of the Revenue Act of 1921, that a protest must be specific to entitle a taxpayer to allowance of interest on a refund from date of payment of tax, which this Court had under consideration in *Girard Trust Company* v. *United States*, 270 U. S. 163.

The omission on the part of the taxpayer in the instant case is more serious than the omissions which this Court refused to sanction in the *Rock Island R. R.* and *Girard Trust Company cases, supra.* In requiring a return to be sworn to, the law has a twofold object in view. The first and principal object is to compel some ascertainable person to report the truth, and the second to provide a basis for punishing him if he wilfully falsifies. These objects are of the utmost importance to an efficient and equitable administration of the law. They make necessary fewer investigations on the part of the Government to ascertain the true facts, thereby facilitating the dispatch of public business and lowering its costs. The measure of the income tax is the taxpayer's net income. This information is peculiarly within the knowledge of the taxpayer. The most effective, and, indeed, the only practicable way to secure that information and at the same time to make reasonably sure of its accuracy is to require, as has been done in Section 239, *supra,* that it be furnished under the sanctity of an oath.

To condone failure to swear to a tax return as required by Section 239, *supra,* would be to invite carelessness in the preparation of the return, to make the information contained therein less reliable, and to render it of little or no value to the Treasury Department. Assessment would be more difficult and require a longer time and, in the event of wilful falsity, the taxpayer would escape prosecution for perjury, which is one of the penalties provided by law to insure honesty in returns. In view of these consequences Congress could hardly have intended an unsworn tax return to set the statute of limitations in motion.

The Circuit Court of Appeals in the instant case, while recognizing the importance of the statutory requirement that a return shall be verified, held that the collector should have refused to receive the unsworn form and that, inasmuch as the absence of the verification was not noticed until four and one-half years after filing, the return must be treated as the return required by statute. The effect of this holding is to make the Government liable for the negligence or laches of its officers contrary to the principle of law first established by this Court in *United States* v. *Kirkpatrick,* 9 Wheat. 720, often approved, and recently applied in *Utah Power & Light Co.* v. *United States,* 243 U. S. 389, 409, and *Ches. & Del. Canal Co.* v. *United States,* 250 U. S. 123, 125.

In those cases where State courts have had occasion to pass upon the sufficiency of a return or list

which was not given under oath as required by law, it has been held that a taxpayer could take no benefit from such unsworn return or list. *Newell* v. *Whitingham,* 58 Vt. 341; *Lawrence* v. *City of Janesville,* 46 Wis. 364; *Lee* v. *The Commonwealth,* 36 Ky. 311. See also *Narragansett Pier Co.* v. *Assessors,* 17 R. I. 452, where a taxpayer's petition for relief was dismissed solely for noncompliance with the statute fixing certain requirements with respect to returns; and *Davis* v. *United States,* 17 C. Cls. 292, which held that an exporter was not entitled to the allowance of a drawback for internal taxes paid on exported manufactures because the claim filed with the Commissioner of Internal Revenue failed to include the certificate and affidavit required by the Treasury Regulations.

Article 407 of Treasury Regulations 45, (1919 ed.), *supra,* which was in effect at the time the respondent corporation filed its unsigned and unsworn return, provided that "imperfect or incorrect returns will not be accepted as meeting the requirements of the statute." Under subsequent Acts which reenacted the same requirements of the 1918 Act as to the oath to the return this regulation has remained unchanged. (Regulations 62, 65, and 69, *supra.*)

Finally, it is submitted that Section 277 (a) (2), *supra,* being a statute of limitations barring the Government, should receive a strict construction rather than the liberal interpretation which the Circuit Court of Appeals applied in this case.

United States v. *Whited & Wheless*, 246 U. S. 552, 561; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 314; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462. But see *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 349–350.

It is to be noted that the opinion of the Circuit Court of Appeals is by a divided court. The majority opinion admits that, (R. 20), "the matter is not as clear as we would wish."

CONCLUSION

In view of the importance of the question involved and of the fact that the decision below seems to be in conflict with the principles announced by this Court in the cases which have been cited, it is respectfully submitted that a writ of certiorari should be issued.

CHARLES E. HUGHES, Jr.,
Solicitor General.

SEWALL KEY,
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Special Assistants to the Attorney General.

AUGUST, 1929.

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